SARBAN SINGH A

v.

GINDO AJAIB SINGH & ORS

HIGH COURT SABAH & SARAWAK, MIRI B
STEPHEN CHUNG J
[SUIT NO: MYY-21-1/2-2012]
20 JULY 2012

CIVIL PROCEDURE: *Pleadings - Writ and statement of claim - Striking out - Application for - Whether claim time barred - Whether suit filed outside limitation period of two years - Limitation Ordinance of Sarawak, item 19 - Whether action maintainable under s. 2 Public Authorities Protection Act 1948* C

CIVIL PROCEDURE: *Action - Striking out - Whether claim time barred - Whether suit filed outside limitation period of two years - Limitation Ordinance of Sarawak, item 19 - Whether action maintainable under s. 2 Public Authorities Protection Act 1948* D

LIMITATION: *Public Authorities Protection Act 1948 - Section 2 - Whether claim time barred - Whether suit filed outside limitation period of two years - Limitation Ordinance of Sarawak, item 19 - Whether action maintainable* E

The plaintiff was the registered owner of a parcel of land ('the land') situated in Miri. It was the plaintiff's allegation that the first defendant had fraudulently sold and transferred the land pursuant to an Irrevocable Power of Attorney registered at the Miri Land Registry. The plaintiff further submitted that the first defendant had forged his signature on the Power of Attorney and that the fourth defendant, being the legal firm that prepared and attested the plaintiff's purported signature in the Power of Attorney and prepared the Sale and Purchase Agreement as well as the Memorandum of Transfer was negligent in doing so. The plaintiff also pleaded that the second defendant, being the Superintendent of the Lands and Surveys Department of Miri, was negligent in failing to ensure that the first defendant had the requisite power to transfer the land when it registered the transfer of the land to a third party. In light of this, two applications arose before the court. The first application ('encl. 9') was an application by the fourth defendant to strike out the writ and statement of claim on F G H I

A the ground that it disclosed no cause of action against the fourth defendant because the action was barred by limitation. The second application ('encl. 16') was an application by the second and third defendants for the court to determine the questions under O. 14A Rules of the High Court 1980, *ie*, (i) whether the plaintiff's claim
B against the second and third defendants were barred by virtue of the provisions of the Limitation Ordinance of Sarawak; and (ii) whether the plaintiff's action against them was maintainable under s. 2 of the Public Authorities Protection Act 1948 ('PAPA').

C

Held (allowing applications in encls. 9 and 16; dismissing plaintiff's action against second, third and fourth defendants):

(1) There were disputes of facts which could only be resolved by the parties and their witnesses being subject to cross
D examination in a trial of the action. The court should not embark on a minute and protracted examination of the pleadings and affidavit evidence nor make any comment on the veracity or strength of the case of the parties in these applications (*Abdul Rahim Abdul Hamid & Ors v. Perdana*
E *Merchant Bankers Bhd & Ors;* refd). (para 10)

(2) The act of negligence complained of against the second and third defendants was the registration of the memorandum of transfer which the plaintiff had pleaded was wrongful. The said
F memorandum of transfer was registered on 1 August 2007 at the Miri Land Registry and the two year limitation period expired on or before 1 August 2009. This suit was filed by the plaintiff against the second and third defendants on 2 February 2012, well outside the limitation period of two
G years. Similarly, this action was filed well outside the thirty six months mandated by PAPA. (paras 15 & 17)

(3) The plaintiff had not shown that Item 19 of the Schedule of the Limitation Ordinance of Sarawak and/or that s. 2(a) PAPA
H were not applicable and/or not applicable to the facts and circumstances of this case. The plaintiff had also not shown that it could escape from the defence of limitation as pleaded by the second and third defendants. The plaintiff's action was therefore statute barred against the second and third
I defendants. (para 18)

(4) The Irrevocable Power of Attorney was registered at the Miri Land Registry on 31 May 2004. The Sale and Purchase Agreement was dated 4 June 2004 and the memorandum of transfer was registered on 1 August 2007. Based on these dates, the alleged acts of malfeasance, misfeasance or nonfeasance occurred outside the two year limitation period as prescribed under Item 19 of the Schedule to the Limitation Ordinance. Again, the plaintiff had not shown that it could escape the provisions of the Limitation Ordinance. Similarly, the plaintiff's action against the fourth defendant was time barred. (para 20)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Kerajaan Malaysia & Ors v. Lat Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Ronex Properties v. John Laing [1983] 1 QB 398 ***(refd)***

Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***

Tio Chee Hing & Ors v. Government Of Sabah [1981] 1 LNS 146 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 7(5)
Limitation Act 1953, s. 4
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 14A, O. 18 r. 19(1)

For the plaintiff - Jimmy Wee; M/s Jimmy HT Wee & Co Advocs
For the 2nd & 3rd defendants - Marjanah Adenan; SAG's Chambers
For the 4th defendant - Arthur Lee; M/s Arthur Lee, Lin & Co Advocs

Reported by Suhainah Wahiduddin

JUDGMENT

Stephen Chung J:

[1] The plaintiff pleaded that he was the registered owner of a parcel of land described as Lot 514 Block 8 Miri Concession Land District. The plaintiff pleaded that in June 2010 he discovered that the 1st defendant, who is his sister, had in 2004 fraudulently sold and transferred his land pursuant to an Irrevocable Power of Attorney registered at the Miri Land Registry on 31 May 2004.

A The plaintiff pleaded that the 1st defendant and or persons unknown had forged his signature on the Power of Attorney. The Plaintiff also pleaded that the Power of Attorney did not confer any power on the 1st defendant to sell and transfer the land.

B **[2]** The plaintiff pleaded that the 4th defendant being the legal firm that prepared and attested the plaintiff's purported signature in the Power of Attorney and prepared the sale and purchase agreement and the memorandum of transfer was negligent in doing so. The plaintiff pleaded that the 2nd defendant being the C Superintendent of the Lands and Surveys Department at Miri was negligent in failing to ensure that the 1st defendant being the donee of the Power of Attorney had the requisite power to transfer the land when it registered the transfer of the land to a third party. All the defendants have disputed the plaintiff's claims D against them.

[3] There are two applications before the court. The first application (encl. 9) is an application by the 4th defendant to strike out the writ and statement of claim on the ground that it disclosed no cause of action against the 4th defendant because E the action is barred by limitation. The second application (encl. 16) is an application by the 2nd and 3rd defendants for the court to determine the questions under O. 14A Rules of the High Court 1980 ('RHC') whether the plaintiff's claim against the 2nd and 3rd defendants is barred by virtue of the provisions of the F Limitation Ordinance and whether the plaintiff's action against them is maintainable under s. 2 of the Public Authorities Protection Act. They prayed that the plaintiff's action should be struck out in the event the court rules in favour of the 2nd and 3rd defendants.

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[4] Pursuant to O. 18 r. 19 RHC, it is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it H obviously unsustainable. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence: *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36.

I

[5] Although the plaintiff had initially pleaded that he was the registered owner of the land per se and that the 1st defendant and or unknown persons had forged his signature in the Power of Attorney to enable the 1st defendant to sell and transfer his land without his knowledge and consent, he has shifted from that position after the defendants have filed their respective defence. He has since admitted that the land belonged to his father who died after an accident and that he was given the letters of administration to administer the estate of his late father. He said that he never claimed that he owned 100% shareholding in the beneficial ownership of the land.

[6] The defence showed that there were 12 beneficiaries under the estate of his late father, including his mother, the 1st defendant and other siblings. The plaintiff did not deny this. From the pleadings, the proceeds from the sale of the land were distributed to all the beneficiaries under the estate except the plaintiff. He complained accordingly and that he had expended sums of money to repair the house on the land and to pay for the land premium for the title to be issued in his name.

[7] The 1st defendant has pleaded that the plaintiff had misrepresented to the lands and surveys and had applied for the land title to be issued in his name instead of to him as the representative of the estate of their late father. When they found out, they lodged a caveat against the land. She said that the plaintiff tried to sell the land but was not successful because of the caveat against the land and because the plaintiff did not settle the land premium. She said that the plaintiff was not paid any share from the proceeds of sale of the land because he had previously taken and kept for his own use the money in the bank belonging to the estate and the compensation money paid to the estate arising from the accident. It was also pleaded that he has been collecting the rentals received from the land.

[8] The 1st defendant pleaded that in 2004 the plaintiff agreed with her and the other beneficiaries under the estate that if they agreed not to demand an account of the estate from him, he would transfer the land to her name on behalf of the other beneficiaries and that he would not claim for a share of the proceeds from the sale of the land. She pleaded that because the land premium had not been paid in full then, the transfer could not be effected and it was agreed that he would grant the

A Irrevocable Power of Attorney to her to deal with the land. It was pleaded that they went to the legal firm of the 4th defendant to have the Power of Attorney prepared and executed. It was pleaded that the plaintiff gave his identity card to be photocopied, attended and signed the Power of Attorney at the office of the B 4th defendant and delivered possession of the land title and rent booklet to the 1st defendant.

[9] The plaintiff in his affidavit denied that he attended the office of the 4th defendant or that he had given his identity card C to be photocopied or that he had signed the Power of Attorney in the office of the 4th defendant. He also denied that he had delivered the land title to the 1st defendant. The plaintiff said that when he went to live in the timber camp at Long Apu, Baram, he left his identity card, the land title and rent booklet in the house D where his mother and siblings were staying to avoid the documents being lost or being eaten by rats in the timber camp. He said he did not know how the 1st defendant got hold of these documents.

E **[10]** From the pleadings and the affidavits filed, there are disputes of facts which can only be resolved by the parties and their witnesses being subject to cross-examination in a trial of the action. The court should not embark on a minute and protracted examination of the pleadings and affidavit evidence nor make any F comment on the veracity or strength of the case of the parties in these applications: *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457; [2000] 2 MLJ 417.

[11] However, the applications to strike out filed by the 2nd, 3rd G and 4th defendants are on the ground that the action is statute-barred. It is the contention of the plaintiff that where there is a defence under the Limitation Ordinance, the defendant can either plead that defence and seek the trial of a preliminary issue or in a very clear case to seek to strike out the claim upon the ground H that it is frivolous, vexatious and an abuse of the process of the court: *Ronex Properties v. John Laing* [1983] 1 QB 398.

[12] In *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751; [2011] 3 AMR 485, the Federal Court held that in I an application for striking out under O. 18 r. 19(1) of the RHC on the ground of limitation to bring an action, a distinction must

be made as to which provision of the law was used to ground such an application. If it was based on s. 2(a) of the Public Authorities Protection Act 1948 or s. 7(5) of the Civil Law Act 1956, where the period of limitation was absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation was not absolute, like in a case under the Limitation Act, such an application for striking out should not be allowed until and unless limitation was pleaded as required under s. 4 of the Act.

[13] The 2nd and 3rd defendants have pleaded that the action against them is barred under the Limitation Ordinance as well as the Public Authorities Protection Act and have asked the court to determine these questions under O. 14A RHC. Similarly, the 4th defendant had pleaded that the action against the 4th defendant is barred by virtue of the Limitation Ordinance and the Public Authorities Protection Act.

[14] They have submitted that Item 19 of the schedule to the Limitation Ordinance applies to this case. Item 19 provides that the limitation period for a suit for compensation for any malfeasance, misfeasance or nonfeasance independent of any contract and not therein specifically provided for shall be two years. Time begins to run when the malfeasance, misfeasance or nonfeasance takes place.

[15] In this case, the act or negligence complained of against the 2nd and 3rd defendants was the registration of the Memorandum of Transfer which the plaintiff has pleaded was wrongful because the 2nd defendant was negligent in failing to ensure that the 1st defendant had the requisite power to transfer the land to the buyer under the Power of Attorney and that the 2nd defendant had also failed to ensure that the 1st defendant had the requisite power to execute the transfer as the attorney of the plaintiff. The plaintiff pleaded that the 3rd defendant was vicariously liable as the employer of the 2nd defendant. The memorandum of transfer was registered on 1 August 2007 at the Miri Land Registry and the two year limitation period expired on or before 1 August 2009. This suit was filed by the plaintiff against the 2nd and the 3rd defendants on 2 February 2012, well outside the said limitation period of two years.

[16] Section 2(a) of the Public Authorities Protection Act (PAPA) provides that where any suit, action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the suit, action prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty six months next after the act, neglect or default complained of.

[17] The 2nd defendant was a public servant and exercising his duty and authority under the Sarawak Land Code. The act or neglect complained of was the registration of the Memorandum of Transfer on 1 August 2007. The plaintiff's action against the 2nd and 3rd defendants is caught by the provisions of this Act. Similarly, this action was filed well outside the thirty six months mandated by PAPA.

[18] The plaintiff has not shown that Item 19 of the Limitation Ordinance and or that s. 2(a) PAPA are not applicable and or are not applicable to the facts and circumstances of this case. The plaintiff has also not shown that it can escape from the defence of limitation as pleaded by the 2nd and 3rd defendants. The plaintiff's action is therefore statute barred against the 2nd and 3rd defendants: see *Kerajaan Malaysia & Ors v. Lat Kee Tee & Ors* [2009] 1 CLJ 663; [2009] 1 MLJ 663, *Tio Chee Hing & Ors v. Government Of Sabah* [1981] 1 LNS 146.

[19] The complaint against the 4th defendant was that it was negligent in preparing the Power of Attorney, the sale and purchase agreement and the memorandum of transfer. It was *inter alia* pleaded that the 4th defendant failed to ensure that the person who instructed the 4th defendant to prepare the Power of Attorney had the necessary authority to do so, that the 4th defendant failed to ensure that the person or donor who signed the Power of Attorney was the plaintiff and that the 4th defendant failed to ensure that the 1st defendant had the requisite power to sell and transfer the land under the Power of Attorney.

[20] The facts showed that the Irrevocable Power of Attorney was registered at the Miri Land Registry on 31 May 2004, that the sale and purchase agreement was dated 4 June 2004 and the memorandum of transfer was registered on 1 August 2007. Based on any of these dates, the alleged acts of malfeasance, misfeasance or nonfeasance occurred outside the two year limitation period as prescribed under Item 19 of the schedule to the Limitation Ordinance. The plaintiff's action against the 4th defendant is not for fraud and that the plaintiff only recently discovered the fraud. Again, the plaintiff has not shown that it can escape the provisions of the Limitation Ordinance. Similarly, the plaintiff's action against the 4th defendant is time barred.

[21] For the reasons given, the applications in encl. 9 and encl. 16 are allowed and the plaintiff's action against the 2nd, 3rd and 4th defendants is dismissed with costs to be taxed, if not agreed.